No. 09-1476

In The
Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, et al.,

Petitioners,

v.

CHARLES J. GUARNIERI, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL FRATERNAL ORDER OF POLICE, THE NATIONAL TROOPERS COALITION & THE PENNSYLVANIA STATE TROOPERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association respectfully submit that a public employee should be protected by the United States Constitution from retaliation by a governmental employer based upon that employee's exercise of his or her Constitutional right of access to courts or filing of a grievance pursuant to a collective bargaining agreement.

Does the Petition Clause of the First Amendment of the United States Constitution protect public employees from retaliation by their governmental employers where the employee exercises his or her Constitutional right to access to the courts or right to file a grievance pursuant to a collective bargaining agreement?

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Brief of *Amici Curiae* the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association

Now come the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association, by and through undersigned counsel, and hereby respectfully submit their Brief in support of Respondent urging affirmance of the judgment of the United States Court of Appeals for the Third Circuit.

Statement of Interest of *Amici*[1]

With this Brief, the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association (hereinafter collectively referred to as "FOP") submits the views of its more than 325,000 law enforcement members regarding the potential implications for officers in law enforcement that will result from the decision rendered by the Third Circuit Court of Appeals. The Brief will focus on:

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[1] The submission of this Brief was consented to by all parties hereto.

The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief.

1. The importance of protecting public employees from retaliatory actions of their governmental employers;

2. The use of this case to establish a workable standard for the protection of the constitutional rights of public employees.

The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities. Law enforcement officers occupy a unique niche within the realm of public employment. Although police officers undeniably occupy the most dangerous and stressful positions in the public domain, police officers are afforded the least protection in regard to their own employment. Only 24 of the 50 states recognize the right of law enforcement officers to engage in binding collective bargaining with their employers. In addition, every state prohibits law enforcement officers from striking in regard to the terms and conditions of their employment.

The FOP perspective on the issues presented in this case is unique and particularly appropriate to the substantive issues presented. Law enforcement personnel nationwide work every day to promote and ensure the safety of citizens. Yet it is this class of public employees that enjoys the least protection in regard to the security of their own employment. Failing to protect these employees from retaliatory

conduct by their governmental employers further erodes the few constitutional protections enjoyed by law enforcement, society's front line of defense.

As public servants, the members of the FOP have always recognized that the first and foremost duty of their profession is to serve society. In exchange for that commitment, law enforcement has only asked to be treated fairly by governmental employers.

It is with these interests in mind that the FOP and its membership respectfully request this Honorable Court to affirm the decision of the Third Circuit Court of Appeals and find that public employees are entitled to constitutional protection from retaliation by their governmental employers as a result of the employee exercising his or her constitutional right to access to courts or filing a grievance pursuant to a collective bargaining agreement.

Argument

I. Public Employees Should be Protected From Retaliatory Conduct of Governmental Employers in Response to that Employee Exercising His or Her Constitutional Right of Access to Courts or Filing a Grievance Pursuant to a Collective Bargaining Agreement.

The FOP is well aware that this Court has been hesitant to extend the protections of the U.S. Constitution to public employees in cases such as *Engquist*

v. Oregon Department of Agriculture, 553 U.S. 591 (2008) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, the present case presents an even more egregious set of circumstances for the public employee and is more akin to cases that have been before this Court on the issue of retaliation in the context of federal employment statutes, such as Title VII. Here, a public employee conclusively demonstrated to a neutral third party that he had been "wronged" by his public employer. This occurred when the grievance regarding his termination was granted by a neutral arbitrator and he was reinstated. Then, to literally add insult to injury, his governmental employer retaliated against him for filing and winning the grievance. The retaliation against him for the filing of the grievance was established based upon the decision of a jury in his favor.

This case presents the most egregious of circumstances for this public employee. Unfortunately, it is the position of petitioners in this case that two wrongs make a right. Specifically, Mr. Guarnieri was wronged when he was unjustifiably terminated and he was again wronged when he was retaliated against by his governmental employer for the filing of a grievance which vindicated him in regard to his unjustified termination. This Court now must decide whether such retaliatory behavior is acceptable in a constitutional law context.

A. The United States Constitution Remains One of the Few Enduring Protections for Law Enforcement Officers Against Retaliatory Conduct of Their Governmental Employers.

According to the U.S. Department of Labor, Bureau of Labor Statistics, police officers and detectives held approximately 861,000 jobs in 2006. Of that number, 79% were employed by local governments, 11% were employed by state police agencies and 7% were employed by various federal agencies. The reality of these statistics is that the vast majority of law enforcement personnel are employed at the local level of government. These officers, in cities and towns across the United States, are ever vulnerable to the whim of local politics, the absence of standardized employment policies and procedures, and little statutory protection regarding the terms and conditions of their employment.

Only 24 States recognize the right of law enforcement officers to enter into binding collective bargaining agreements with their employers.[7] In addition, officers who have the least protection from retaliatory employment decisions are those who work in law enforcement agencies which are not subject to

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[7] Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin.

collective bargaining agreements and are not subject to Civil Service laws. In many cases, these law enforcement agencies are free to treat their employees however they choose, so long as they do so in compliance with the United States Constitution and other applicable federal laws. Even in those States which have Civil Service laws applicable to law enforcement, many such laws make the decisions of Civil Service Boards either completely unreviewable in court or excessively difficult to review.[3]

Another employment issue that uniquely affects law enforcement personnel is the continued blurring of the line between on-duty and off-duty conduct. Many municipalities currently have regulations regarding both the off-duty conduct of police officers and conduct which is defined as "unbecoming" an officer.[4] The intense media scrutiny felt by police officers regarding even day-to-day job responsibilities as well as off-duty conduct results in political pressure for both the governmental employer and the

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[3] *See, e.g., Billings v. Civil Serv. Comm'n*, 154 W.Va. 688, 178 S.E.2d 801, syllabus (1971) ("[a] final order of the Civil Service Commission based upon a finding of fact will not be reversed by this Court upon appeal unless it is clearly wrong."); *City of Detroit v. Detroit Lieutenants' & Sergeants' Ass'n*, No. 250424, 2005 WL 387647, *1 (Mich.Ct.App. Feb. 17, 2005) (stating that even "silly" fact finding by an arbitrator must be upheld on review).

[4] Thomas Martinelli, *Minimizing the Risk of Defining Off-Duty Police Misconduct*, The Police Chief, vol. 74, no. 6, June 2007, at 40-45.

officer.[5] Because of the higher standard to which police officers are held and the resulting political and media pressure which comes to bear, police officers are uniquely vulnerable to politically motivated, arbitrary and retaliatory employment action. As stated above, in many jurisdictions where officers have no binding collective bargaining rights and no civil service protection, constitutional rights claims may be the only recourse for aggrieved officers.

B. The Court Should Analyze a Public Employee's Right To Be Protected From Retaliation In This Context As Broadly As It Has Analyzed Anti-Retaliation Issues in Other Contexts.

There is no dispute in this case that a jury found that Respondent Guarnieri's employer retaliated against him for filing a grievance to vindicate his employment rights. The only issue appears to be whether the United States Constitution should protect Respondent Guarnieri, a public employee, from such retaliatory conduct by his governmental employer.

Congress has made it clear, and this Court's jurisprudence has bolstered the position, that employers should not be allowed to retaliate against

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[5] *See, e.g., Malec v. Vill. of Oak Brook*, No. 06 C 5167, 2007 WL 1468603, *2 (N.D. Ill. May 18, 2007) (" . . . police officials have always been subject to far more detailed scrutiny and reporting requirements than ordinary employees or government workers.").

employees where that employee engages in protected conduct. In fact, this Court has sent a clear and consistent message over the past decade that retaliation against employees because of an employee's exercise of a protected right will not be tolerated, even where federal statutes are silent on retaliation. *See Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (finding that the ADEA prohibits retaliation against a federal employee even though the statute does not expressly apply); *see also, CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (finding that work place retaliation is actionable pursuant to 42 U.S.C. §1981, despite the fact that the statute is silent on retaliation); and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that Title IX encompasses claims of retaliation for complaints of discrimination, even though Title IX does not expressly mention retaliation).

In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court stressed the importance of broadly interpreting anti-retaliation provisions in federal statutes, as protecting employees from retaliation is important in the context of the employer/employee relationship. In broadly interpreting the scope of Title VII's anti-retaliation provisions, the *Burlington* Court stated as follows:

> But one cannot secure the second objective [preventing an employer from retaliating against an employee exercising rights under the act] by focusing only upon employer actions and harm that concern employment

> and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.

Id. at 63.

Similarly, in the recent case of *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), the Court, again, broadly interpreted the anti-retaliation provisions of Title VII to prohibit retaliation against an employee who answers questions during an employer's internal investigation. The Court stated:

> If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

Id. at 852 (citations omitted).

As will be discussed below, an employee who exercises his or her right to access to courts or to file a grievance pursuant to a collective bargaining agreement negotiated with his or her employer, should be

treated no differently for the purposes of an anti-retaliation analysis. As this Court has recognized, protecting employees from retaliation by their employers is an important public concern.

C. The Court Has Recognized The Importance of The Constitutional Right of Access to Courts and Employees Filing Grievances Pursuant to Negotiated Agreements with Their Employers Should be Provided the Same Protection.

Although the parties to this case, as well as other *Amici*, have characterized the constitutional right at issue in this case as the "right to petition the Government for a redress of grievances," the FOP believes that the right may also be characterized as a First Amendment right of access to courts. As this Court stated in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972): "The right of access to the courts is indeed but one aspect of the right to petition." *Id.* at 510 (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Ex parte Hull*, 312 U.S. 546, 549 (1941)). In *Trucking Unlimited*, the Court ruled that antitrust laws could not be used to prohibit the filing of legitimate lawsuits, even if the intent of filing was to be anti-competitive, because to construe antitrust laws in such a way would defeat the right of access to courts and, thusly, the right to petition. *Id.* at 510-511.

In *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), this Court, though not ruling on First Amendment grounds, nevertheless noted that it had long viewed the right to sue in court as a form of petition. The Court stated, "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *Id.* at 517 (citing *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)).

The jurisprudence of this Court has demonstrated that the right of access to courts is a crucial aspect of petitioning the government. In *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 733 (1983), the Court held that the National Labor Relations Board cannot enjoin as an unfair labor practice a legitimate lawsuit by an employer, even if the employer's only reason for initiating the suit was to retaliate against an employee's proper exercise of his rights under the National Labor Relations Act. *Id.* at 743. The Court held that the employer's right of access to a court was too important to be censured as an unfair labor practice, even when the sole object of the lawsuit was to enjoin an employee from exercising a protected right. *Id.* at 741.

The Court has also emphasized the importance of the right of access to courts in other contexts such as Eleventh Amendment immunity and the Americans with Disabilities Act. Specifically, in the case of *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), the Court held that Title I of the ADA (authorizing suits for employment

discrimination) did not abrogate Eleventh Amendment immunity for the States. However, in *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court ruled unanimously that a prisoner could proceed with his Title II ADA claims for damages against the State of Georgia to the extent that his claims alleged independent violations of the Constitution, specifically, access to courts and judicial services.

Having clearly established the right of access to courts to be a precious one, there is no rational argument that the use of an agreed-upon grievance procedure be provided any less deference. In this case, the retaliation against Mr. Guarnieri by his employer occurred following his utilizing a successful grievance procedure. That grievance procedure had been agreed upon between him and his employer for the purposes of avoiding the institution of litigation. There is no legitimate reason to treat grievances filed pursuant to an agreed-upon grievance procedure any differently than claims filed in courts.

Nearly twelve million Americans are employed by federal, state or local governments. U.S. Bureau of Labor Statistics, Statistical Abstract of the United States (2007). As one author has stated, "[t]he Constitution and the Bill of Rights developed in an era when the primary relationship between the state and the citizen was that of governor and governed. Today, the relationship is often one of employer and employee." Margo Pave, *Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances*

and Lawsuits Against Their Government Employers, 90 Nw. U. L. Rev. 304, 336 (1995) (quoting the Supreme Court, 1982 Term, 97 Harv. L. Rev. 164, 169 (1983)).

This Court has made it clear in recent decisions that federal policy favors arbitration of labor disputes and conflict resolution procedures contained in collective bargaining agreements should be viewed as a favored means of resolving employee grievances. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that an agreement contained in a securities exchange's registration obligating the employee to arbitrate all claims against his employer was enforceable with respect to the employee's claim under the Age Discrimination in Employment Act. As stated by the *Gilmer* Court:

> The Court in . . . *Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitration process," however, has been undermined by our recent arbitration decisions. "We are well past the time when judicial suspension of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

Id. at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) (internal citations omitted)).

The Court extended its holding beyond securities exchange's registrations to employment contracts generally in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In the case of *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009), this Court held that a collective bargaining agreement that requires arbitration of Age Discrimination in Employment Act (ADEA) claims, "is enforceable as a matter of federal law." *Id.* at 1474. In noting that the collective bargaining procedure was a satisfactory method to resolve claims under the federal employment statute at issue, the Court stated, "Parties generally favor arbitration precisely because of the economics of dispute resolution . . . as in any contractual negotiation, a union may agree to the inclusion of the arbitration provision in a collective-bargaining agreement in return for other concessions from the employer." *Id.* at 1464 (citing *Circuit City*, 532 U.S. at 123). In so holding, this Court has found that grievance and arbitration procedures pursuant to a collective bargaining agreement should receive the same legal recognition as if the claims were adjudicated in a court setting. As such, the fact that Mr. Guarnieri, in this case, filed a grievance to adjudicate his employment rights, as opposed to filing a lawsuit, should have no bearing on whether his actions should be protected from retaliatory conduct by his governmental employer.

Conclusion

This Court has repeatedly held that employees should be protected from the retaliatory conduct of their employers. This case presents the Court with the question of whether it will protect an employee who has demonstrated both that he was wrongfully terminated and that he was subsequently retaliated against for seeking to vindicate himself. The United States Constitution remains one of the few enduring protections for law enforcement officers against retaliatory conduct by their governmental employers. The public employees who risk their lives every day to enforce the laws of the United States should be entitled to protection under the very laws they are sworn to uphold. This Court has recognized the importance of the constitutional right of access to courts, and employees filing grievances pursuant to negotiated agreements with their employers should be provided the same protection.

Based upon the foregoing, the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association request this Court to uphold the judgment of the United States Court of Appeals for the Third Circuit and find that the Petition Clause of the First Amendment protects public employees from retaliation by their governmental employers where the employee exercises his or her constitutional right to access to courts or

right to file a grievance pursuant to a collective bargaining agreement.

Respectfully submitted,

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